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# Actors and the Characters They Create

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What makes a character in a movie or TV show compelling? Or, more importantly, *who* makes a character in a movie or a TV show compelling? When audiences fall in love with a character, it is usually because the actors and writers synthesize their talents effectively. This means the more that each of these parties intertwine their intellectual labor, the higher the intellectual property interest in a given piece of media. Contracts mediate the interests between these parties, but when an actor's performance of a character is fused to the creation of the character itself, it's worth considering additional legal methods for protecting the actors' intellectual property rights.

One character-driven show that illustrates this phenomenon is *Buffy the Vampire Slayer*. The former prime-time teen show turned cult-classic has a new audiobook written and acted by members of the original cast, set to release next month.<sup>[1]</sup> It will feature James Marsters' performance as Spike, which serves as a prime example of an actor's performance constituting the intellectual property of a character. Joss Whedon—the show's creator—wrote the character as a minor villain for the show's protagonist to face off with for a season. Originally, Marsters was only contracted for 5-10 episodes, as Whedon planned to kill off the character.<sup>[2]</sup> After the fan's enthusiastic response to Marster's performance, Whedon was put under immense pressure to continue Spike's character on the show. According to Marsters, Whedon was so upset with what the character of Spike was turning into that he shoved Marsters against a wall out of anger.<sup>[3]</sup> Spike went on to be a series regular through the finale. One actor's performance can shape the trajectory of a character, and an entire body of work with it. It follows that the performance itself could constitute a tangible piece of work eligible for a copyright claim.

Courts have not properly grappled with defining an actor's contribution to the development of a copyrightable character as a unit of intellectual property in and of itself. Although it is based in the Copyright Act of 1976, common law is the primary source of authority for copyright over characters.<sup>[4]</sup> Because it is such a subjective issue, the tests used for determining a copyrightable character are not very consistent. Courts and practitioners conceptualize the copyright as an extension of the work itself, with one often-used element of a copyrightable character being how integral that character is to the story.<sup>[5]</sup> However, the uniqueness and specificity of a character's details is an equally important factor when evaluating qualification for copyright.<sup>[6]</sup> Courts have acknowledged that a performance can contribute to a character's eligibility for copyright. For example, *Anderson v. Stallone*, Sylvester Stallone's physicality and emotion were factors that made Rocky Balboa a distinctive enough character to copyright.<sup>[7]</sup> An actor's performance can play a key role in creating intellectual property rights over a character.

Courts seem to neglect the actor's performance itself as discretely copyrightable.<sup>[8]</sup> One artistic argument in favor of this is that splintering the artistic process might undermine the efficacy of intellectual property altogether. When units of the intellectual property development process are separated, this can actually stifle creative innovation.<sup>[9]</sup> Although courts are correct to recognize the synergy that goes into creating filmed media, it's not necessarily true that giving people more intellectual property right claims will disrupt the artistic process.

*Buffy* again serves as an example of the importance of collaboration and actors' intellectual property rights. The actors and writers built off each other's strengths as artists.<sup>[10]</sup> Unfortunately, artistic synergy doesn't mean a sustainable partnership. In 2021, several actors from *Buffy* came forward on social media accusing Whedon of creating a hostile work environment.<sup>[11]</sup> Despite this, many of these actors are choosing to come together to work on an audiobook together explicitly out of love for these characters.<sup>[12]</sup> Fox, which currently owns the copyright for *Buffy*, is helping produce the audiobook, so the show can continue without having to address any potential competing stakes in the intellectual property of these characters. But it does beg the question, would these actors have had the right to do this project without the support of Fox? What if Whedon tried to invoke his intellectual property rights to stop it? Perhaps intellectual property rights over characters would be best suited as a protection from copyright infringement or breach of contract, rather than a wholesale establishment of the performance as a copyrightable unit. If an actor is a factor that makes a character copyrightable, they can exercise expression with that performance any way they choose, free from any copyright claims from the owner of the associated work.

- [1] Sydney Bucksbaum, *Original Buffy the Vampire Slayer Stars Returning for New Audible Series About Splie*, Entertainment Weekly (Sept. 13, 2023), <https://ew.com/podcasts/buffy-the-vampire-slayer-stars-returning-audible-series> [<https://perma.cc/SH5R-NYHG>] [<http://web.archive.org/web/20230923215206/https://ew.com/podcasts/buffy-the-vampire-slayer-stars-returning-audible-series/>].
- [2] Inside of You Clips, *Was James Marsters Aware of the Joss Whedon Toxic Workplace on BUFFY?!?*, YouTube (Sept. 22, 2021), <https://www.youtube.com/watch?v=hynZ2j9M9IE> [<https://perma.cc/6Z8S-CC5X>] [<http://web.archive.org/web/20230923215615/https://www.youtube.com/watch?v=hynZ2j9M9IE>]; Inside of You with Michael Rosenbaum, *Buffy's James Marsters Talks Experience on Set, Breakout of Buffy, and Competition in Art*, YouTube, (Jul. 14, 2020), <https://www.youtube.com/watch?v=oj19YNIu1Mw> [<https://perma.cc/EEJ6-GWXB>] [<http://web.archive.org/web/20230923220035/https://www.youtube.com/watch?v=oj19YNIu1Mw>].
- [3] *Id.*
- [4] Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and A New Common Law*, 17 Loy. L.A. Ent. L.J. 651, 659 (1997); Amanda Schreyer, *An Overview of Legal Protection for Fictional Characters: Balancing Public and Private Interests*, Cybaris, 56 (2015).
- [5] *See generally Warner Bros. Pictures v Columbia Broad. Sys.*, 216 F.2d 945 (9th Cir. 1954).
- [6] Amanda Schreyer, *An Overview of Legal Protection for Fictional Characters: Balancing Public and Private Interests*, Cybaris, 56 (2015).
- [7] *Anderson v Stallone*, 87-0592 WDKGX, 1989 WL 206431 (C.D. Cal. 1989)
- [8] *Garcia v Google, Inc.*, 786 F.3d 733, 741 (9th Cir. 2015).
- [9] *See generally* Michael Heller, *The Tragedy of the Anticommons: A Concise Introduction and Lexicon*, 76 Mod. L. Rev. 6 (2013).
- [10] Ronda Wilcox, *Why Buffy Matters*, 32-6 (I.B. Taurus, 2006).
- [11] Lynn Elber, *Film, TV maker Joss Whedon Faces 'Buffy' Actor Abuse Claims*, Associated Press (Feb. 10, 2021), <https://apnews.com/article/joss-whedon-abuse-claims-f0377203767b031e658c8dcc00251424> [<https://perma.cc/RW3R-BV5B>] [<http://web.archive.org/web/20230923221017/https://apnews.com/article/joss-whedon-abuse-claims-f0377203767b031e658c8dcc00251424>].
- [12] Charisma Carpenter, Instagram (Sept. 14, 2023), [https://www.instagram.com/p/CxLrd0HgeA8/?img\\_index=1](https://www.instagram.com/p/CxLrd0HgeA8/?img_index=1) [<https://perma.cc/F37B-AZFT>] [No WayBack Archive].

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